

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRANDEE LEIGH PEIKERT,

Defendant-Appellant.

UNPUBLISHED

November 17, 2011

No. 298999

Kent Circuit Court

LC No. 09-008066-FH

Before: JANSEN, P.J., and SAWYER and SHAPIRO, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of using a computer to commit a crime, MCL 752.796(1), interfering with electronic communications, MCL 750.540(2), and two counts of fourth-degree criminal sexual conduct, MCL 750.520e(1)(e) (sexual contact by a mental health professional within two years of a patient/therapist relationship). The trial court sentenced defendant to concurrent terms of 276 days in jail for each of her convictions. We affirm.

Defendant first argues that the prosecution impermissibly shifted the burden of proof during its closing argument when it noted that defendant had not produced any exculpatory evidence. Defendant did not raise this issue at trial, so we review her claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). “A prosecutor may not imply in closing argument that the defendant must prove something or present a reasonable explanation for damaging evidence Also, a prosecutor may not comment on the defendant’s failure to present evidence because it is an attempt to shift the burden of proof.” *People v Fyda*, 288 Mich App 446, 463-464; 793 NW2d 712 (2010). “However, a prosecutor’s argument that inculpatory evidence is undisputed does not constitute improper comment.” *Id.* at 464. Additionally, the prosecution may comment on theories raised by the defense, and may point out flaws in a defendant’s arguments. *People v Fields*, 450 Mich 94, 111-112; 538 NW2d 356 (1995).

During the prosecution’s closing argument, it noted that the record contained no evidence to refute what the prosecution offered. “But what you don’t have is any contradictory evidence There is nothing in the record All of the evidence in this case demonstrates that [the crimes] did take place” Again in rebuttal, the prosecution argued that the defense was trying to distract the jury from focusing on a lack of contradictory evidence in the case:

Now I indicated to you earlier, when I was doing my closing argument, that there wasn't any evidence to contradict the proof that the elements have been — the proofs submitted that shows [sic] the elements have been proven beyond a reasonable doubt. . . . *There's nothing in there to suggest that it's not true, but it's all about everything else. . . . When you don't have a defense, when the evidence is so powerful, as it is in this matter, you have to attempt to try something other than try the case* [Emphasis added.]

Defendant alleges that these remarks impermissibly shifted the burden of proof. We disagree, and conclude that, in context, the prosecution merely responded to defendant's theory of the case, i.e., that the victim was unreliable. Throughout trial, the defense contended that the victim lacked credibility, and it called the victim's ex-boyfriend to testify that the victim had offered him \$50,000 in exchange for his favorable testimony. In response, the prosecution's closing and rebuttal noted that there was no evidence to contradict the inculpatory evidence it offered, and that defendant was trying to distract the jury from focusing on this. Thus, the prosecution's argument was a commentary on defendant's theory of the case, and was not an attempt to shift the burden of proof. "Where a defendant . . . advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant." *Id.* at 415. Defendant has not established plain error requiring reversal.

Next, defendant contends that the trial court abused its discretion when it found good cause to allow two expert witnesses to testify for the prosecution. The prosecution called Greg Vedders, a Senior Networks System Administrator at Aquinas College, and Special Agent Timothy Kruithoff, an agent with Immigration and Customs Enforcement, to help establish that defendant accessed the victim's e-mail and Facebook accounts without authorization. Both witnesses testified as experts, despite the prosecution's earlier contentions that neither would testify as an expert. Before trial, defendant requested information on the expert witnesses pursuant to MCR 6.201(A)(3), but the prosecution failed to provide the requisite information. Under MCR 6.210(A)(3), a party must, upon request, provide the names, reports, and curriculum vitae of any experts testifying at trial. Despite the prosecution's noncompliance with MCR 6.210(A)(3), the trial court found good cause to modify the discovery rules and endorsed the witnesses as experts. A trial court has discretion under MCR 6.201(I) to modify the discovery rules based on a showing of good cause, and can either disregard discovery violations or permit discovery that is not otherwise mandatory. See *People v Phillips*, 468 Mich 583, 586; 663 NW2d 463 (2003); MCR 6.201. In this case, the trial court predicated its finding of good cause on the fact that defendant knew about the witnesses and the substance of their respective testimonies before trial, and because she anticipated that they might testify as experts.

We review a trial court's decision to permit an endorsement of witnesses for an abuse of discretion. *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *Id.* "[In order] to establish that the trial court abused its discretion, [a] defendant must demonstrate that the court's ruling resulted in prejudice." *People v Callon*, 256 Mich App 312, 328; 662 NW2d 501 (2003). With regard to the endorsement of witnesses in violation of the discovery rules, a trial court does not abuse its discretion in finding good cause to permit a

witness to testify if the opposing party is not unfairly surprised by the endorsement. *Id.* at 326-327.

In this case, the trial court did not abuse its discretion when it found that good cause existed under MCR 6.201(I) to permit Vedders and Kruithoff to testify as experts. Good cause existed under MCR 6.201(I) to modify the requirements of discovery because defendant was not surprised by the endorsement of Vedders and Kruithoff as experts. Defendant knew about both witnesses before trial, and she knew the substance of their testimony. She also had access to a report prepared by Kruithoff. When counsel knows the identity of witnesses and the substance of their testimony before trial, a trial court does not abuse its discretion in allowing the witnesses to testify, despite a violation of the discovery rules. *Id.* Additionally, defendant cannot show prejudice. *Id.* at 328. The prosecution introduced evidence of an e-mail where defendant admitted to the crimes that made up the substance of Vedders and Kruithoff's testimonies. Thus, defendant did not suffer prejudice because of the trial court's decision, and her claim for relief is denied.

In defendant's Standard 4 brief, she argues that she was denied the effective assistance of counsel. A defendant is denied effective assistance of counsel in violation of the Sixth Amendment if counsel's "performance fell below an objective standard of reasonableness, [and] the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). Effective assistance of counsel is presumed, and this Court defers to trial counsel's strategy. *Id.* at 343-344. Here, defendant argues that counsel was ineffective for a litany of reasons, including failing to give an opening statement, failing to effectively cross-examine witnesses, and failing to call witnesses on her behalf. However, the record does not demonstrate that counsel's performance in any of these areas fell below an objective standard of reasonableness. Furthermore, each of the alleged deficiencies falls squarely within the ambit of trial strategy. "We will not second-guess counsel on matters of trial strategy, nor we will assess counsel's competence with the benefit of hindsight." *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Accordingly, defendant was not denied the effective assistance of counsel.

Finally, defendant in her Standard 4 brief argues that the trial court erred when it admitted three of the prosecution's exhibits at trial. However, defendant does not cite any authority in support of her argument, and thus abandons it. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) ("[a]n appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority"). Moreover, we have reviewed the arguments, and they have no merit.

Affirmed.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Douglas B. Shapiro